IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON Respondent, v. MICHAEL A. MAY, Appellant.	No. 37189-8-II UNPUBLISHED OPINION

Bridgewater, P.J. — Michael A. May appeals the trial court's imposition of a standard range minimum sentence for May's convictions on guilty pleas for one count of second degree child molestation and one count of second degree child rape. We affirm.

Facts

On August 16, 2007, May entered guilty pleas to one count of second degree child molestation (count I) and one count of second degree rape of a child (count II). The matter came before the trial court for sentencing in a series of hearings. At the commencement of the proceedings, the sentencing judge indicated that he had reviewed the following documents: a

Community Counseling Services plan dated June 23, 2006; a Pacific Polygraph investigation report dated June 5, 2006; a Comte & Associates psycho/sexual evaluation treatment plan dated January 16, 2007; a pre-sentence investigation report (PSI) prepared by the Department of Corrections (DOC) dated October 29, 2007; and six letters supporting May from family and friends.

Commensurate with the State's recommendation, the court did not consider any statements made by May in the PSI because May had not been advised of his right to remain silent or right to counsel during the questioning by the DOC officer who prepared the report. Defense counsel also objected to the PSI and its conclusions, arguing that it was premised upon a factual inaccuracy about when May's abuse of M.M. began. The court ruled that it would consider the remainder of the PSI report, but would give it what weight the court deemed appropriate in light of the other evidence presented at the sentencing hearing.

The State argued against imposing a sentence under the special sex offender sentencing alternative (SSOSA), and instead sought a standard range term of 31 months on count I and a minimum standard range term of 102 months on count II, to run concurrently. The victim and her mother made statements to the court. Both asked the court to impose a SSOSA sentence.

Michael Comte, a sex offender treatment provider, testified as to his conclusion, set forth in his psycho/sexual evaluation treatment plan, that May was a viable candidate for a SSOSA sentence. The court admitted several studies and treatises offered by the State (exhibits A through J, and exhibit L), but indicated that it would consider only those portions of the exhibits about which Comte was questioned and about which Comte offered testimony.

The court ultimately denied the SSOSA sentencing option and sentenced May to a minimum term of 120 months. In so ruling, the trial court noted the length of time that May abused the victim (six years when M.M. was 9 to 15 years of age), May's prior incident in San Diego,[1] and May's statement in court to the victim that he hoped his actions did not harm or affect her in any way. The court concluded that the safety of the community was better served if May was incarcerated. May filed a timely notice of appeal.

Discussion

May contends that the sentencing court erred in denying his request for a SSOSA sentence and that resentencing before a different judge is required.[2] We disagree.

SSOSA is a sentencing alternative available for first-time sex offenders who meet certain criteria. Former RCW 9.94A.670(2) (2002). The decision to grant or deny SSOSA is discretionary. *State v. Onefrey*, 119 Wn.2d 572, 575, 835 P.2d 213 (1992). Former RCW 9.94A.670(4) (2002). The sentencing court is not required to accept the recommendation of the evaluator. Former RCW 9.94A.670(4). We review the denial of a SSOSA sentence for an abuse of discretion. *State v. Frazier*, 84 Wn. App. 752, 753, 930 P.2d 345, *review denied*, 132 Wn.2d 1007 (1997). A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Hays*, 55 Wn. App. 13, 16, 776 P.2d 718 (1989).

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[1] May's polygraph report and his psycho/sexual evaluation contain his admission that while in his mid 20s he had sexual intercourse with a 15-year-old girl in San Diego.

[2] Throughout his brief, May cites to the current version of several statutes. However, the version of the statute in effect at the time he committed his crime is to be applied. *See State v. Varga*, 151 Wn.2d 179, 191, 86 P.3d 139 (2004) (sentencing court must look to the statute in effect at the time the defendant committed the current crimes when determining defendant's sentences).

Also, under the Sentencing Reform Act, a trial judge may rely on facts that are admitted, proved, or acknowledged to determine "any sentence." Former RCW 9.94A.530(2) (2002); Laws of 2002, ch. 290, § 18.[3] This includes whether to grant a SSOSA sentence. Former RCW 9.94A.530(2); *State v. Grayson*, 154 Wn.2d 333, 339, 111 P.3d 1183 (2005). Acknowledged facts include all those facts presented or considered during sentencing that are not objected to by the parties. *Grayson*, 154 Wn.2d at 339; *see also* former RCW 9.94A.530(2).

Moreover, a criminal defendant generally is permitted to appeal a standard range sentence only if the sentencing court failed to follow a procedure required by the Sentencing Reform Act. RCW 9.94A.585(1); *State v. Autrey*, 136 Wn. App. 460, 469, 150 P.3d 580 (2006). Accordingly, May couches his argument as a procedural challenge to the trial court's denial of his request for a SSOSA sentence. May argues that because he disputed one of the facts contained in the PSI report, the trial court was required under RCW 9.94A.530(2) to either not consider the point or conduct an evidentiary hearing on the matter to resolve the point, but failed to do either.[4] He argues that these procedural failings warrant a new sentencing hearing before a different judge. We disagree.

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[3] Former RCW 9.94A.530(2) states in relevant part:

> In determining any sentence, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Acknowledgement includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point.

[4] May relies on the current version of the statute, but former RCW 9.94A.530(2) (2002), *see* footnote 3, actually applies here. In any event, the differences in the versions of the statutes are not relevant here.

At sentencing, May contended that the court should not follow the PSI report, which concluded that May was not a good candidate for SSOSA, because the report incorrectly stated that May's sexual abuse of M.M. started when she was four or five years old and that inaccuracy tainted the sentencing. May did not object to the court's consideration of other reports that indicated that the earliest abuse was at about nine years of age. The court commented, "I think I've already stated that I think that the age span here, I think, is more supportive of the fourth grade time frame than the four to five year old time frame, as far as when specific remembrance of sexual assaults occurred." II RP at 85. As can be seen, the court *adopted* May's position on the issue of when his abuse of M.M. commenced. In light of the trial court's adoption of May's position on the contended matter, we hold that an evidentiary hearing was not required. *Cf. State v. Atkinson*, 113 Wn. App. 661, 669-70, 54 P.3d 702 (2002), *review denied*, 149 Wn.2d 1013 (2003) (defendant waives his right to an evidentiary hearing where much of the relevant information is admitted through documents to which defendant did not object).

Similarly, there is simply no indication that the sentencing judge was tainted by the disputed information on that subject in the PSI as May contends; so, there was no need for the judge's recusal. Nor can May now be heard to complain that the sentencing court failed to order another PSI when the court offered to do so and defense counsel rejected that offer. *Cf. In re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) (reviewing court will deem asserted error waived if the party asserting such error materially contributed thereto).

May's remaining arguments also fail. His reliance upon *State v. Jerde*, 93 Wn. App. 774, 783, 970 P.2d 781, *review denied*, 138 Wn.2d 1002 (1999), and *State v. Van Buren*, 101 Wn.

App. 206, 218, 2 P.3d 991, *review denied*, 142 Wn.2d 1015 (2000), is misplaced. While those cases employed the remedy of remanding for resentencing under a different judge, the cases are inapposite because each involved a breached plea agreement, and that circumstance is not present here.

May next asserts that remand for entry of findings is required by RCW 9.94A.670(4). But the version of the statute that he cites was enacted after May committed the crimes and it therefore does not apply to his sentence. *Varga*, 151 Wn.2d at 191.[5]

In a pro se statement of additional grounds, May argues that he should have received a SSOSA sentence because he qualified for a SSOSA and the State failed to make an effective argument as to why he should not get a SSOSA. But SSOSA eligibility does not amount to entitlement, and the decision to grant a SSOSA sentence is discretionary *See State v. Montgomery*, 105 Wn. App. 442, 444, 17 P.3d 1237, 22 P.3d 279 (2001).

Finally, May contends that there were many factual inaccuracies regarding his SSOSA evaluation, yet he vaguely alludes to only alleged misinformation about another victim. Presumably, he is referring to his admitted prior sexual contact with a minor in San Diego. But May does not attempt to show how the sentencing court's consideration of this incident was

[5] RCW 9.94A.670(4) was amended in 2004 in part to require that the court "shall give great weight" to the victim's opinion whether the offender should receive a SSOSA alternative sentence; and, if the sentence imposed is contrary to the victim's opinion, the court "shall enter written findings stating its reasons for imposing the treatment disposition." *See* Laws of 2004, ch. 176, § 4 (effective July 1, 2005). The version of the statue applicable here only required the trial court to decide whether in its discretion a SSOSA sentence was appropriate. Accordingly, the court was not required to state reasons for its decision or make findings to support it. Former RCW 9.94A.670(4); *Hays*, 55 Wn. App. at 15-16.

improper, and thus he has not adequately presented any basis for resentencing. RAP 10.10(c).[6]

In sum, May has identified no ground warranting resentencing under a different judge.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, P.J.

We concur:

Armstrong, J.

Hunt, J.

[6] As noted, May disclosed the San Diego incident in his psycho/sexual and polygraph reports, which were admitted at sentencing without objection. Because no conviction resulted from the incident, it did not render May ineligible for SSOSA consideration, *see* former RCW 9.94A.670(2); but as part of May's admitted sexual history, the sentencing court properly considered the information in deciding whether to impose a SSOSA. *See Onefrey*, 119 Wn.2d at 575 (the decision to employ SSOSA is entirely within the trial court's discretion).